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IN THE

# Supreme Court of the United States

OCTOBER TERM, A. D. 1935.

No. [redacted] 17

MECHANICS UNIVERSAL JOINT COMPANY, A CORPORATION, AND GRACE EKSTROM, ADMINISTRATRIX OF THE ESTATE OF ERIC S. EKSTROM, DECEASED,

*Petitioners,*

*vs.*

A. B. CULHANE, RECEIVER OF THE MANUFACTURERS NATIONAL BANK AND TRUST COMPANY OF ROCKFORD, ILLINOIS, SUCCESSOR TO L. B. ACHOR, FORMER RECEIVER,

*Respondent.*

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

**PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.**

S. R. KENWORTHY,
Moline, Illinois,
*Solicitor for Mechanics Universal Joint Company.*

SHELBY L. LARGE,
Rockford, Illinois,
*Solicitor for Grace Ekstrom, Administratrix of Eric S. Ekstrom, Deceased.*

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*Petitioners,*

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*Respondent.*

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PETITION FOR WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT. HEARD IN THAT COURT ON APPEAL FROM UNITED STATES DISTRICT COURT FOR NORTHERN DISTRICT OF ILLINOIS, WESTERN DIVISION (HONORABLE CHAS. E. WOODWARD, JUDGE).

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## PETITION FOR WRIT OF CERTIORARI.

The petitioners, Mechanics Universal Joint Company, a corporation, and Grace Ekstrom, Administratrix of the Estate of Eric S. Ekstrom, Deceased, pray that a Writ of Certiorari issue to review the decree of the Circuit Court of Appeals for the Seventh Circuit, entered in the above cause on November 15, 1935 (Record 238) (80 Fed. (2) 147),

which decree affirmed, with costs and interest, the decree of the District Court for the Northern District of Illinois, Western Division (Record 195-6). A petition for rehearing was filed with the Circuit Court of Appeals on the 4th day of December, A. D. 1935 (Record 238), which was denied on December 31, 1935 (Record 239). The Defendant Eric S. Ekstrom departed this life intestate on January 12, 1936 and by Order of the Circuit Court of Appeals, Grace M. Ekstrom, Administratrix of the Estate of Eric S. Ekstrom, was substituted as a party Appellant in this cause in place of Eric S. Ekstrom (Record 259).

## Decree Below.

The decree below was a money decree dated July 14, 1934 ordering that Respondent have and recover from Defendants Mechanics Universal Joint Company and Eric S. Ekstrom, the sum of $25,216.45; that each of said Defendants are ordered and directed by the Court, within twenty (20) days of this date, to return to the possession of A. B. Culhane, Receiver of the Manufacturers National Bank and Trust Company of Rockford, Illinois, the said sum of $25,216.45, with interest to date of payment; that execution may issue; that Defendants pay costs, and that execution of decree be stayed until August 20, 1934 (Record 195).

## Questions Presented.

A withdrawal of a portion of a deposit in a National Bank (Manufacturers National Bank), by a corporation depositor (Mechanics Universal Joint Company), was made on Saturday, June 13, 1931, the last day the Bank was open for business, but at a time when the Bank was open for business and on a day when the Bank was able to, and did, meet all demands made upon it, when, at the time the withdrawal was effected, and during the whole of that banking

day it had committed no act of insolvency. On Friday, June 12, 1931, the day before the withdrawal, a Bank Examiner from the Comptroller's Office had addressed an informal meeting of the Bank's Directors, (of which Board of Directors of the Bank the Corporation depositor's President was a member and was present), and had advised the Directors that *another* Bank (Security National Bank) in the City was in trouble and that he (the Examiner) was endeavoring to effect a consolidation of that other Bank with still another Bank in the City; that whether the consolidation could be effected or not would be known definitely the following Monday, and that in his opinion whether the merger were effected or not, the result would be that a condition of uneasiness would result on the following Monday, which would, in his opinion, cause a run on every Bank in the City, and in his judgment the cash reserves of the Bank, whose Directors he was addressing, could not stand a protracted run, and he requested the Board to authorize him to negotiate with some other Bank for a merger or take-over of some kind, which authority the Board of Directors gave. Following the meeting, (held at noon on Friday) the President of the corporation depositor, joined with its Secretary-Treasurer, signed, as President and Secretary-Treasurer, respectively, of the depositor, a check drawn by the depositor on said Bank for $42,716.12, payable to itself, and duly endorsed to the Third National Bank of Rockford, which check was sent by mail to the last named Bank, which received the check and presented it for payment to the Clearing House on Saturday morning, June 13th, where it was paid by the Manufacturers Bank, and the result was, that the amount represented by the check was transferred to the account of the depositor in the Third National Bank. It also appears from the evidence, objected to by Defendant, that the Bank had been examined by the agent of the Comptroller in December

and April previous to the withdrawal (June 12) and that the President of the depositor, in his capacity as Director of said Bank, had been notified by the Comptroller, in writing, about January 13 and May 28 that some of the Bank's assets were doubtful, some desperate; that the Bank had suffered some losses and heavy withdrawals and demanding that the Bank take immediate steps to liquidate or further secure the criticized assets (see excerpts from Comptroller's letters in Court's finding 13, Record 189-190) (See also Exhibits 22, 24 and 25, Record 242-254).

There is no proof in the Record either (1) that the Manufacturers Bank had committed any act of insolvency at the time the check in question was paid, nor (2) is there any proof that the Bank, or its Officers, at the time of paying the check, contemplated any act of insolvency, or was faced with the maturity of any obligation it was unable to meet, unless it can be said that the *opinion* of the Bank Examiner that the condition of the Security Bank was such as, *in his opinion,* would cause uneasiness among all depositors in the City which would cause runs upon every Bank in the City, and that the run upon the Manufacturers Bank would be so protracted that it could not meet the same, is conclusive proof of the fact that the Bank was facing a situation such as would amount to a contemplation, by its Officers, of an act of insolvency; and there is in the Record no proof of any kind that the paying Officers of the Bank paid the check in question with any intent to prefer the depositor over any other creditor of the Bank, or with a purpose to prevent the application of the Bank's assets as provided by the National Banking Act, and the proof is that the check was paid as a part of the ordinary and usual business of the Bank.

The questions involved in this case are:

1. Whether a payment made by a National Bank to its depositor under the circumstances above enumerated, was

a void payment, because of R. S. 5242 (Sec. 91 of Banking Act).

2. Whether a payment made under the circumstances enumerated can be set aside as fraudulent, regardless of R. S. Sec. 5242, on the theory that the President of the Corporation depositor, took advantage of his inside or confidential information, gained in his capacity as a Director of the Bank, and assisted his Corporation to a preference by means thereof.

3. Whether, in the application or construction of R. S. 5242, the intention of the payee of the fund withdrawn from a National Bank, to obtain a preference for himself, is what is inhibited by the Section, or does the Section, in so far as it relates to intention, apply only to the intention of the Bank or its paying Officers.

4. Whether a counterclaim of such corporate depositor, seeking a recovery against the Receiver for deposits made when the Bank was hopelessly insolvent, on the theory that it was such fraud on the part of the Bank, in receiving the deposits, that the title thereto did not pass to the Bank, can be denied on the theory that knowledge by the depositor's President of facts which indicated the Bank was in a precarious condition, gained by him as a Director of the Bank, is chargeable to the depositor because he was its President.

5. Whether a money decree against the President of the depositor may be lawfully entered, where the proof is conclusive that the payment by the Bank was not made by him; that he received no benefit from it, and that the payment which is avoided by Section 5242 was admittedly made to the depositor and not to the President.

## Statute Involved.

The Statute under which decree was rendered is Section 5242 of the Revised Statutes (12 U. S. C. A. Sec. 91) and is as follows:

> "All transfers of notes, bonds, bills of exchange or other evidences of debt owing to any national banking association or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void."

## Statement.

The facts out of which this controversy grows are, in brief, as follows:

Petitioner, Mechanics Universal Joint Company (hereinafter for brevity called the "Joint Company") was in 1931 a manufacturing corporation with a plant and factory in Rockford, Illinois. It was a subsidiary of Borg-Warner Corporation, which owned all its shares except Directors' qualifying shares (Record 105).

Eric S. Ekstrom, President of the Joint Company, was also a Director of the Manufacturers National Bank and Trust Company of Rockford, hereinafter called "Manufacturers Bank".

The petitioner, Joint Company, in June, 1931, maintained deposits in various Banks in Rockford, Illinois, as follows: (Record 87)

1 In Manufacturers Bank

2. In Security National Bank
3. In Third National Bank
4. In Rockford National Bank
5. In Swedish American National Bank

During the months of May and June, 1931, the Joint Company had deposited in the Manufacturers Bank in its commercial or checking account the following amounts on the dates stated: (See Plaintiff's Exhibit 3, Record 123-124)

| | |
|---|---|
| May 6 | $ 167.19 |
| May 9 | 28,021.33 |
| May 15 | 24,911.68 |
| May 18 | 25,000.00 |
| May 23 | 534.35 |
| May 25 | 4,163.00 |
| May 28 | 2,928.61 |
| May 29 | 10,149.61 |
| May 30 | 284.44 |
| June 1 | 10,195.28 |
| June 6 | 44,617.21 |

(Record 188) (Record 123-4).

It also maintained a savings account in said Bank of $10,000.00 (Record 98).

On June 12, 1931, the Joint Company had on deposit in the Manufacturers Bank a balance, in its checking or commercial account, of $63,224.30, and a balance on deposit in its savings account of $10,000.00 (Finding 8, Record 188).

On June 12, 1931 petitioner drew its check on the Manufacturers Bank for $42,761.12, payable to itself. This check was signed by Officers of Joint Company as follows: By Eric Ekstrom, President, and H. E. Gustafson, Secretary-Treasurer, and on the back was endorsed by the Joint Company to Third National Bank of Rockford (Record 133). This check was mailed to Third National Bank of Rockford on June 12, 1931 together with a deposit slip directing the Third National Bank to deposit the amount of same to the

credit of the Joint Company with said Bank (Plaintiff's Exhibit 2, Record 122). This check was received by the Third National Bank in due course of mail and was presented by it for payment, through the Rockford Clearing House, on Saturday, June 13, in the morning clearings of that date (Record 38) and the same was paid and honored by the Manufacturers National Bank on presentation.

The Manufacturers National Bank remained open for business during the whole banking day of June 13, 1931 and during that day it met and honored every demand made upon it and took and received every deposit tendered to it (Finding 23, Record 192) and was able to and did meet all its obligations as they matured.

On Thursday, June 11, 1931, one Floberg, the President of the Rockford Clearing House, who also happened to be President of the Manufacturers National Bank, had received notice from the President of the Security National Bank that the latter Bank might likely not be able to meet its clearings, and Floberg, as President of the Clearing House, had relayed the information to the National Bank Examiner at Chicago, and had received word from the Examiner that the Examiner would immediately proceed to Rockford, which he did, arriving there on the morning of June 12. The Examiner first went to the Security Bank and made tentative arrangements by which the Swedish American Bank would take over the Security Bank, subject to an appraisal of assets of the latter Bank, and had secured a contract for said take-over, subject to said appraisal, signed by both Banks involved. (Record 38-39) About eleven o'clock in the morning of June 12, the Examiner (Baty) attended a meeting of the Directors of the Manufacturers Bank which he had requested the President of the Bank to call, and at said meeting Ekstrom, a Director of the Bank, who was also President of the Joint Company, was present.

The Examiner at this meeting briefly discussed the banking situation, told of the situation in which the Security Bank found itself, stated he had arranged for a take-over of the Security Bank by the Swedish American Bank and stated that this situation, whether the take-over was effected or not, in his opinion, would cause uneasiness and a critical bank situation in Rockford the following Monday, and expressed his opinion that the situation would result in a run on all Banks in Rockford on the following Monday, and stated it as his opinion that the anticipated run would be so severe that the Manufacturers Bank could not withstand it, on account of its low cash reserves, and he suggested that "it would be for the best interests of the banking situation for their Bank to try and arrange some place to take their deposit liability under cover." He outlined to them that there were four National Banks on the east side of the river in Rockford, and that with two National Banks on the east side the banking position would be much better. The Directors expressed the opinion they could stand any kind of a run that developed. The Examiner stated their cash reserves were entirely too low for the Bank to weather any continued drain of deposits and it was his opinion, and the opinion of the Chief Examiner, that they would require far greater cash reserves. (See Record 39-40) As a result of this meeting the Directors of the Manufacturers Bank authorized Baty to discuss a possible merger of said Bank with any Bank of Rockford. Committees were appointed by the Manufacturers Bank to meet with a Committee of the Bank with whom Baty was to negotiate to effectuate the proposed merger.

This conference between the Bank Examiner Baty and the Directors of the Manufacturers National Bank terminated about noon on Friday, June 12, 1931, and after that meeting the Bank continued to function in its ordinary way and the balance of that banking day, June 12, and all of

the banking day of June 13, during which days it committed no act of insolvency, it met, in due course, all of its obligations as they matured, received all deposits which were tendered to it and in every respect conducted its business as a solvent, going Bank. When it closed at the end of the day's business on Saturday, June 13, it closed with the expectation on the part of all its managing officers that it would reopen for business the following Monday, as usual. It was faced with no matured obligation that it was unable to meet. It closed on Saturday at the conclusion of the day's business with approximately half a million dollars in cash, or its equivalent, in its vault, or on deposit in other Banks. (Record 44. See also Defendants' Exhibit 5, Record 171) This consisted of

| | |
|---|---|
| Cash | $253,240.06 |
| On deposit, Federal Reserve | 220,181.21 |
| On deposit in other Banks | 12,435.94 |

At the time the payment in question was made, not a single one of its managing officers contemplated the commission of an act of insolvency or contemplated the closing of the Bank. After the Bank closed for its day's business on Saturday, which was after the payment of the check in question, a meeting was held between a Committee from the Third National Bank of Rockford and a Committee from the Manufacturers National Bank, which had been arranged by Examiner Baty, for the purpose of appraising the assets of the Manufacturers National Bank, as a part of the negotiations for the merger which the Bank Examiner was endeavoring to effectuate. This meeting between the Committees from the two Banks convened at seven o'clock in the evening of June 13, at the Manufacturers National Bank, after the Bank had closed its business for that day, and continued in session until the following morning. No conclusion was arrived at as to the merger at that meeting. Nothing was done at that meeting except to go over the

assets of the Manufacturers National Bank and there was some discussion as to the value of some of the assets, but no conclusion was reached as to the value of any of the assets. (See testimony of Achor, Record 61-62) On Sunday night, June 14, the Directors of the Manufacturers National Bank were called together, and at that time the Directors were advised by Examiner Baty and Chief Bank Examiner Leyburn, that the Third National Bank of Rockford would not consider the proposed merger unless the Directors of the Manufacturers National Bank would turn over to the Third National Bank certain specified assets of the Manufacturers National Bank, and in addition thereto, would pay to the Third National Bank $750,000.00 in cash, and that this payment would have to be made before Bank opening time on Monday morning, June 15. The Examiner further stated that he knew it was impossible for the Directors of the Manufacturers Bank to comply with the demands of the Third National Bank within the time specified, and he demanded that the Directors of the Manufacturers National Bank adopt a resolution (Plaintiff's Exhibit 6, Record 126),

> "That due to frozen and non-liquid assets, it is the opinion of the members of this Board convened that the interest of the depositors of this Bank can best be preserved by suspending business and placing the affairs of this Bank in the hands of the Comptroller of the Currency: Now, therefore: BE IT HEREBY RESOLVED; that the business of this Bank be suspended and placed in the hands of the Comptroller of the Currency."

The Bank Directors protested that the Bank was not insolvent and at first refused to adopt the resolution which the Examiner had already prepared previous to the meeting, but under threat of prosecution by the Comptroller, of the Directors, if they kept their Bank open, and received deposits, the Directors reluctantly passed the resolution, which is found in the Record at Page 126, after the same was somewhat modified. (See also Record 104).

There is no question but that the first time the Directors of the Manufacturers Bank or any of its Officers knew that the Bank would not resume business on Monday, June 15, was at the meeting on Sunday evening, June 14, and this was approximately thirty-six (36) hours after the payment of the check in question.

The Record contains no proof that prior to the payment of the check in question the Manufacturers National Bank had committed any act of insolvency, nor that its Officers contemplated the commission of an act of insolvency, and neither the District Court nor the Court of Appeals found that any act of insolvency had been committed, or was contemplated by any of the Officers of said Bank at the time of the payment of said check. The theory upon which the decree was rendered, and sustained by the Court of Appeals, as we understand it, is that although the Manufacturers Bank was keeping open and doing business in the regular way and holding itself out thereby to be a solvent, going institution on June 12 and 13, yet, its condition was, in fact, precarious, and that the Officers of the Bank should have suspended payment sooner than they did, and the Bank's Officers should have known that the Bank was insolvent at the time the check in question was paid by it, and because they should have known it, it will be presumed that they paid the check in question "with a view" of preferring the Joint Company, or of preventing the application of the Bank's assets as provided by the National Banking Act.

## Rulings of the Court Below.

It is our contention that the decree of the Court below, on the merits, was erroneous and against the established Federal Law; that the Court erroneously admitted in evidence Plaintiff's Exhibits 22, 24 and 25, and that these latter Exhibits formed the only basis upon which the District

Court or the Court of Appeals could base the decree. Plaintiff's Exhibit 22 was a letter from the Comptroller of the Currency to the Board of Directors of the Manufacturers National Bank, dated January 8, 1931, together with an Examiner's Report of the condition of said Bank for the period ending December 4, 1930 (Record 242, 243, 244, 245, 246, 247). Plaintiff's Exhibit 24 is a letter from the Comptroller of the Currency to the Board of Directors of the Manufacturers National Bank, dated May 28, 1931 (Record 248-249) and Plaintiff's Exhibit 25 is the Examiner's Report of the condition of the Manufacturers National Bank, concluded on May 1, 1931 (Record 250, 251, 252 and 253). These letters and reports shown by the above Exhibits are the usual and customary reports of examination by the agents of the Comptroller, and the usual letters from the Comptroller to the Directors of the Bank submitted by the Comptroller with said report. The reports of examinations made by the Examiners to the Comptroller, while showing some criticized assets, and some losses, and some doubtful assets, fall far short of showing that the Bank was insolvent at the time of the examinations, and the letters of the Comptroller to the Directors of the Bank, while criticizing numerous assets and demanding speedy liquidation of the same or further security for the same, do not state that the Bank was insolvent at the time the letters were written, and there is no finding or statement by the Comptroller in any of the letters that the Bank was insolvent. The Bill of Complaint in this case does not count upon the insolvency of the Bank, nor has it any reference to the condition of the Bank prior to June 12, 1931, and there is no allegation of the Bill of Complaint which is proved in any way by the Plaintiff's Exhibits 22, 24 and 25. It is petitioner's contention that these Exhibits have no competency as against the depositor of the Bank, namely, the Mechanics Universal Joint Company, and the

Exhibits, taken together, amount to nothing more than the unsworn opinions of public officials as to the value and character of certain assets of the Bank. The reports of examination are not public documents but are confidential documents, the reports of the Examiners being for the use of the Comptroller only and the letters from the Comptroller to the Directors being confidential communications from the Comptroller to them.

## Reasons for Granting the Petition.

Section 5242 of the Revised Statutes (U. S. C. A. Sec. 91) has been in force for many years. It was originally enacted in 1873. It has been construed by the Supreme Court of the United States in only two cases, namely, *McDonald* v. *Chemical National Bank,* 174 U. S. 610; 43 L. Ed. 1106, and *National Security Bank* v. *Butler,* 129 U. S. 223; 32 L. Ed. 682. The Section has been construed in a multitude of cases by the various Circuit Courts of Appeal, and as we view it, there is an entire lack of harmony in the principles announced governing the construction of this Section. It is our contention that the decision in the case at bar is in conflict with the principles announced by this Court in the *McDonald* case and *Butler* case, *supra.* The decision in the case at bar is directly in conflict with the decisions of the Circuit Court of Appeals of the Second Circuit in the cases of *Hayden* v. *Chemical National Bank,* 84 Fed. 874, and *Nelson* v. *Lewis,* 73 Fed. (2) 521, and with the decision of the Circuit Court of Appeals of the Tenth Circuit in the case of *Rucker* v. *Kokrda,* 68 Fed. (2) 73.

During the recent depression hundreds of National Banks throughout the country have suspended business and the cases pending, founded upon Section 5242 of the Revised Statutes, are numerous. We have been unable to ascertain the number of cases still pending founded upon

this Statute but are advised that there are a number of cases pending in the District Court of the United States for the Northern Division of Illinois, which are yet undisposed of, and we have no doubt but that the same condition prevails in nearly every District Court in the United States. The last occasion that this Court has had to examine this Statute and construe the same was in the year 1899 in the case of *McDonald* v. *Chemical National Bank, supra,* and if the construction by this Court in that case is correct, and is correctly understood by petitioners, that construction was not followed by the Circuit Court of Appeals of the Seventh Circuit in the case at bar, and it is of vital importance, not only to the people of the United States, but to the members of the profession of the United States to be able to determine the liability of a depositor who withdraws money from a National Bank shortly before it suspends business. A determination by this Court of the proper construction of Section 5242 will enable counsel to correctly advise those clients who are sued under said Section whether to settle or to litigate the controversy. Great numbers of cases are reported in the Federal Reports of cases based upon this Statute. In most of them, the payments were made after an act of insolvency and there is no question but that the liability exists. In the case at bar the payment was not made after an act of insolvency had been committed by the Bank, nor was it made in contemplation of the commission of an act of insolvency by the Bank, nor was it "made with a view to prevent the application of the Bank's assets in the manner prescribed" by law, or "with a view to the preference of one creditor to another".

It is of the utmost importance that Bank depositors in National Banks throughout the United States know, by an authoritative opinion of this Court, whether the portion of the Statute "with a view to prevent" or "with a view to the preference" has reference to the intention on the part of

the managing Officers of the Bank who are making the payment, or has reference to the intention of the recipient of the payment. That question has never been decided by this Court except in the case of *National Security Bank* v. *Butler, supra,* where this Court has held that the intention indicated by the words "with the view to" has reference only to the intention of the paying officers of the Bank. In the case at bar the lower Courts have construed the Statute as though the intention evidenced by the words "with the view to" has reference to the person receiving the payment. In view, therefore, of the uncertain condition of the law with reference to the construction of this Statute, and in view of the fact that the decree below was and is probably in conflict with the decisions of this Court, we believe the case presents a question of sufficient public importance to justify this Court in re-examining this Record.

It is the contention of petitioners that the following principles of law are firmly established:

## I.

That before a Court is justified in declaring a payment, made by a National Bank, at the time the Bank is open for business, accepting all deposits tendered to it and meeting all demands which were made upon it, to a bona fide creditor, void by reason of R. S. 5242, the conditions imposed by Congress in said Section rendering the payment void, must appear in the evidence; that these conditions are, (1) that the payment must be made after the commission of an act of insolvency, or, (2) in contemplation of an act of insolvency, and in addition thereto the payment must be made "with a view" or with the intent *on the part of the paying officers of the Bank* either (a) to prevent the application of the Bank's assets in a manner provided by the National

Banking Act, or, (b) to prefer the payee over other creditors of the Bank.

II.

That the fact that the Officers of the Bank at the time the payment was made, in fact knew that the Bank was insolvent and would ultimately be forced to suspend business unless a favorable turn took place, or new money was obtained, is not sufficient to raise the presumption that the payment was made with the intent on the part of the Bank's Officers to prevent the application of the Bank's assets in the manner provided by Law, or to prefer the payee over other creditors, where the payment was made at a time when the Bank was able to and did meet all of the demands made upon it as they were made and was receiving all deposits which were tendered to it, and where the proof fails to show that the Bank was faced with any maturing obligation which it was unable to meet.

III.

That in the construction and application of R. S. 5242 the intent which is referred to in said Statute by the words "with a view to" has no reference to the intent of the payee but has reference only to the intent of the paying officers of the Bank.

IV.

That R. S. 5242 provides the only statutory condition for declaring a payment made by a National Bank to its depositor void. That neither at Common Law nor under any established rule of equity can a payment made by a National Bank to its depositor, who is not an officer or stockholder of

said Bank, be declared void, because of the intent of the depositor in making the withdrawal. Both at Common Law and in equity diligent creditors, regardless of their motive or intent, are favored.

Respectfully,

S. R. KENWORTHY,
Moline, Illinois,
*Solicitor for Mechanics Universal Joint Company.*

SHELBY L. LARGE,
Rockford, Illinois,
*Solicitor for Grace Ekstrom, Administratrix of Eric S. Ekstrom, Deceased.*

IN THE

# Supreme Court of the United States

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MECHANICS UNIVERSAL JOINT COMPANY, A CORPORATION, AND GRACE EKSTROM, ADMINISTRATRIX OF THE ESTATE OF ERIC S. EKSTROM, DECEASED,

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A. B. CULHANE, RECEIVER OF THE MANUFACTURERS NATIONAL BANK AND TRUST COMPANY OF ROCKFORD, ILLINOIS, SUCCESSOR TO L. B. ACHOR, FORMER RECEIVER,

*Respondent.*

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

## BRIEF.

### I.

The decision of the Court below in so far as it holds that a recovery can be had from the recipient of a payment of money, under R. S. 5242, without proof (1) that the payment was made after the commission of an act of insolvency, or (2) in contemplation of an act of insolvency, and

that the payment can be avoided regardless of such proof without it further appearing from the evidence that the payment was made

(a) with a view to prevent the application of the Bank's assets in a manner prescribed by the National Banking Law, or

(b) with a view to the preference of one creditor to another

is a construction of an Act of Congress (R. S. 5242), which is in conflict with the following decisions of Circuit Courts of Appeals of other Circuits, viz:

*Second Circuit.*

*Nelson* v. *Lewis,* 73 Fed. (2) 521-3.

*Hayden* v. *Chemical National Bank,* 84 Fed. 874-5-6.

*Tenth Circuit.*

*Rucker* v. *Kokrda,* 68 Fed. (2) 73 (75).

II.

The holding of the Court below in so far as it intimates that the decree can be sustained regardless of Section 5242 on the theory that the President of the Corporation depositor took advantage of his inside or confidential information, gained in his capacity as Director of the Bank, and assisted his Corporation to a preference by means thereof, is probably in conflict with the decision of this Court in the case of *The Sanford Fork and Tool Company* v. *Howe, Brown & Company,* 157 U. S. 312 (317), 39 L. Ed. 713.

III.

The opinion of the Court below, in the construction of a Federal Statute, in so far as it holds, with respect to a payment by a National Bank in the due course of its busi-

ness and at a time when it was open receiving deposits and meeting all demands made upon it as they were presented to it, where the Bank was insolvent and known by its Officers to be such, that such payment is void, because the Officers making the payment are presumed to have made the payment with the intent to prefer the payee or with an intent to prevent the application of the Bank's assets according to the Banking Law, is contrary to, and at variance with, the construction which this Court has given said Act in the case of *McDonald* v. *Chemical Bank,* 174 U. S. 610 (613), 43 L. Ed. 1106 (1109). And is in conflict with the decision of the Second Circuit Court of Appeals in *Hayden* v. *Chemical National Bank,* 84 Fed. 874-5-6 and *Nelson* v. *Lewis,* 73 Fed. (2) 521 (523) and of the Court of Appeals of the Tenth Circuit in *Rucker* v. *Kokrda,* 68 Fed. (2) 73 (75), and this conflict is recognized by the dissenting opinion of McDermott, Judge, of the Circuit Court of Appeals of the Tenth Circuit in the case of *Aycock* v. *Bradbury,* 77 Fed. (2) 14 (18).

## IV.

The opinion of the Court below in so far as it holds that in the proper construction of a Federal Statute (R. S. 5242) the intention of the recipient of the payment to prefer himself over other creditors is sufficient to start in operation the Statute in question in the absence of proof that the paying officers of the Bank, when said payment was made, had such intention, is at variance with, and in direct conflict with, the holding of the Circuit Court of Appeals of the Fourth Circuit in the case of *Lucas* v. *Federal Reserve Bank,* 59 Fed. (2) 617, and is probably in conflict with the holding of this Court in the case of *National Security Bank* v. *Butler,* 129 U. S. 223, 32 L. Ed. 682.

## Opinions Below.

The decree of the District Court below, and the decision affirming the same by the Circuit Court of Appeals of the Seventh Circuit, in effect decide that, although there was no proof in the Record that the payment in question was made after an act of insolvency had been committed (and the District Court expressly so held in its finding of Fact Number 24, Record 193), and in the absence of any proof in the Record, or finding of fact, that the payment was made in anticipation of an act of insolvency, that nevertheless the payment was within the condemnation of R. S. 5242; which holding is, we believe, erroneous and in conflict with other decisions of Circuit Courts of Appeal of other Circuits; and by the decisions of both Courts in the case at bar it was, in effect, held that the fact that, after the payment, the Comptroller of the Currency found the Bank to be insolvent, and that because the Comptroller previous to the payment had criticized some of the assets of the Bank, and the National Bank Examiner previous to the payment had advised the Directors and Officers of the Bank that in his opinion the Bank, because of other conditions prevailing in the City, was probably faced with a run, which, in the opinion of the Bank Examiner, would be so protracted that the Bank probably would be unable to meet the same, was sufficient to raise the presumption that the Officers of the Bank, in making said payment, did so with an intent to prefer the payee over other creditors of the Bank, or, to prevent the application of the Bank's assets in the manner provided by the National Banking Act, notwithstanding the payment in question was made at a time when the Bank was open for business and able to meet and did meet every demand which was made upon it.

The decisions of both the District Court and the Circuit Court of Appeals in the case at bar decided, in effect,

that regardless of Section 5242 there could be a recovery, upon the theory, as we understand it, that it was unlawful at Common Law, for the Officers of a National Banking Corporation, whose Directors should have known that the Bank was insolvent, and that closing was imminent, to pay a creditor, who made a demand upon it for payment of a legitimate debt due, if the inference can be legitimately drawn that the creditor, in making its demand, was actuated by inside information as to the condition of said Bank.

We believe and assert that in reaching both conclusions above enumerated, the decisions of the lower Courts were not only erroneous, but are in conflict with the decisions of other Courts of Appeal construing the same Statute, and are probably at variance with the decisions of this Court on both propositions.

## The Facts.

The facts are briefly set forth in the petition for Certiorari filed herewith, and are also stated with substantial accuracy in the opinion of the Circuit Court of Appeals, and for sake of brevity we refer thereto without re-statement.

# ARGUMENT.

## I.

### CONFLICT OF DECISIONS.

The conflict between the decision and decree of the Circuit Court of Appeals of the Seventh Circuit and the Circuit Courts of Appeals of other Circuits is sharp and plain. This inconsistency has to do with the construction and interpretation of a Federal Statute, namely, Revised Statutes, Section 5242. The decision of the Circuit Court of Appeals of the Seventh Circuit is contrary to that of other Circuit Courts of Appeals of other Circuits in that:

(a) The Court in the Seventh Circuit, in effect, holds that a payment by a National Bank in due course of its business to a *bona fide* creditor, is void, under said Section, even where no act of insolvency had been committed prior to the payment, and where no act of insolvency was in contemplation of the Bank's Officers at the time of the payment, but solely and only on the ground the Bank was insolvent at a later date, and there had been no appreciable change in its condition between the date of payment and the date the Court holds the proof shows the Bank was insolvent. The Court of Appeals of the Seventh Circuit in the opinion in the case at bar states (Record 235):

> "They" (Appellants) "insist, therefore, that the decree was not justified because (1) the Bank had committed no act of insolvency before the payment of the check, (2) there was no proof of insolvency, (3) none of the Officers of the Bank believed that the Bank was insolvent when the check was paid, and (4) none of the Officers, at the time the check was paid, contemplated an act of insolvency or the closing of the Bank.
>
> "The Court found that fact (1) was true. But, even so, that fact of itself would not invalidate the decree.

> The Court also found that the Bank was insolvent on Sunday, June 14, and that there had been no appreciable change in its condition since June 12, the day of the Directors' meeting. (Record 235-236) That finding, we think, was supported by material evidence and we cannot disturb it. It may be true that none of the Officers thought it was insolvent, or contemplated an act of insolvency or the closing of the Bank, but, in view of the condition disclosed, and the reports and correspondence from the Comptroller, together with the advice and suggestions of the Examiner, we are convinced that the Officers and Directors should have known that the Bank was insolvent, and that closing was imminent."

The implication of this language is to place a construction on said Statute directly contrary to the Courts of Appeal of other Circuits. Practically the same question, construing the same Statute, was before the Circuit Court of Appeals of the Tenth Circuit in the case of *Rucker* v. *Kokrda*, 68 Fed. (2) 73. If the Court will pardon us, we will quote extensively from *Rucker* v. *Kokrda* in so far as the opinion is directed to this point. On Page 75 of the opinion the Court, after quoting Section 5242 of the Statute, said:

> "Did Congress intend to avoid all payments made to depositors in the usual course of business if it later develops that the Bank, while open, was in fact, insolvent? Before attempting a line-by-line analysis of the Section, two reasons immediately suggest themselves which negative any such intent. First, if Congress so intended, a single sentence avoiding all payments made when a Bank is insolvent would have sufficed; that Congress hedged its mandate about with many qualifying clauses belies any such sweeping intent as Appellee contends for. Second, the whole structure of the Banking Act, of which this is a part, is designed to inspire confidence in depositors, to the end that the moneys of the community might be turned into channels of trade. If this section is construed to avoid payments to depositors in regular course, Congress has injected a justifiable apprehension into the

minds of the depositors whose fears it has constantly endeavored to allay. There would be little confidence left in our National Banks if a depositor knew that even if he got his money out before the Bank closed, he might be harried with later suits to redeposit it.

"While the Statute is somewhat confusing, we do not find in it such far reaching intent. There being no transfer or assignment of any securities in the present case, Part (A) of the Section has no application. The payment was one of money and comes within Part (B). Such payments are avoided only if certain conditions exist. First, if made 'after the commission of an act of insolvency'. While it is here contended that the Bank was insolvent when the payment was made, the condition is not insolvency, but is that 'an act of insolvency' has been committed. There is no evidence or finding of any act of insolvency in this case prior to the payment. Second, the payment may be avoided if made 'in contemplation' of an act of insolvency. When this payment was made, the decision to close the doors on the following morning had not been reached. That decision was not arrived at until late that night. True, the Officers knew that unless new money was interested, or confidence restored, the Bank could not indefinitely meet its customers' demands; but when this payment was made, the Officers were hopeful that the negotiations of the night would avert the necessity of an act of insolvency. This payment was, therefore, not made in contemplation of the later act of insolvency. But this is not all; not only must the payment meet either condition (1) or (2)" (that is, after an act of insolvency or in contemplation thereof) "but it must also meet either condition (A) or (B), that is, be made either with a view of preventing the application of its assets as provided by the Banking Act or to prefer one creditor over another. The Banking Act contemplates that depositors should be paid on demand; paying a depositor's check on presentation can, therefore, scarcely be said to be outside the contemplation of Congress in creating National Banks; nor can there be a purpose to prefer one depositor over another when the payment is made at a time when all depositors are being treated exactly alike, the checks of all being paid upon presentation."

The Court of Appeals of the Second Cilrcuit in the case of *Nelson* v. *Lewis*, 73 Fed. (2) 521 adopts the reasoning in the case of *Rucker* v. *Kokrda, supra.*

The decision of the Circuit Court of Appeals of the Seventh Circuit in the case at bar is predicated upon the finding of the District Court

> "That the Bank was insolvent on Sunday, June 14, and there had been no appreciable change in its condition since June 12, the day of the Directors' meeting."

In the case of *Nelson* v. *Lewis*, 73 Fed. (2) 521, the Court of Appeals of the Second Circuit said (page 523):

> "While the Bank was insolvent in the sense that its assets did not equal its liabilities, the question is presented as to whether it could meet its obligations as they matured. The only evidence tending to support a claim that it could not do so is the fact that there was no material change in the Bank's condition between April 1, 1931 and April 8, 1931, the date when the Comptroller of the Currency closed the Bank because of its insolvency."

Discussing this evidence, the Court in *Nelson* v. *Lewis*, after commenting upon the fact that the Bank was open daily for business when the payments in question were made, and remained so open up to April 8, and nothing otherwise indicated that it could not meet its obligations as they matured, then said:

> "Even assuming that the Bank was insolvent on the date of the withdrawals, was this fact known to the Officers? * * * The cases where illegal preferences have been held to have been made show either actual knowledge of insolvency on the part of the Officers (*American Surety Co.* v. *Jackson*, 24 Fed. (2) 768; *National Security Bank* v. *Butler*, 129 U. S. 223) or that the Officers could not help but know because of the assets being greatly below the liabilities. None of the cases hold that there is a presumption of knowledge of insolvency. *McDonald* v. *Chemical National Bank*, 174 U. S. 610, held that an intent to prefer cannot be presumed merely from the fact that the Bank is actu-

ally insolvent and that such condition is known to the Officers."

The same inconsistency between the decision of the Court of Appeals of the Seventh Circuit and other Courts of Appeal will be found by comparing the decision in the case at bar with the decision in *Hayden* v. *Chemical National Bank,* 84 Fed. 874. On Page 876 of the report of the *Hayden* case, that Court, said:

> "The Capital Bank had not committed an act of insolvency. Assuming that its managers knew that its liabilities greatly exceeded its resources, and that it would presently be unable to meet its obligations and have to suspend, there is no evidence that the payments in controversy were influenced by that knowledge. A payment to a depositor or other creditor, in the usual course of the Bank's business as a going concern, and not preparatory in any sense to the anticipated insolvency of the Bank, is not, we think, within the condemnation of the Statute. An act done by a Corporation in the ordinary and usual course of business, uninfluenced by the state of its affairs, cannot be said to have been done in contemplation of insolvency * * *. We are therefore of the opinion that the payments were valid if the remittances belonged to the Defendant from the time they were in the course of transmission to it by mail."

The decision of the Circuit Court of Appeals of the Seventh Circuit in the case at bar is, as we read it, directly in conflict and out of harmony with the decision of the United States Supreme Court in the case of *McDonald* v. *Chemical National Bank,* 174 U. S. 610, in so far as the Circuit Court of Appeals holds that the condition of the Manufacturers Bank, as disclosed by the reports and correspondence from the Comptroller, together with the advice and suggestions of the Examiner, are sufficient upon which to base the holding that the Officers and Directors "should have known that the Bank was insolvent and that closing was imminent." In the *McDonald* case, on Page 618, this Court said:

> "Nor can a finding that the payments and remit-

tances made to the Chemical National Bank on the dates above mentioned were made in contemplation of insolvency and with an intent to prefer that Bank be. based on the mere allegation that the Capital National Bank was actually insolvent, and that its insolvency must have been known to its officers. It is matter of common knowledge that Banks and other Corporations continue, in many instances, to do their regular and ordinary business for long periods, though in a condition of actual insolvency, as disclosed by subsequent events. It cannot surely be said that all payments made in the due course of business in such cases are to be deemed to be made in contemplation of insolvency, or with a view to prefer one creditor to another. There is often the hope that, if only the credit of the Bank can be kept up by continuing its ordinary business, and by avoiding any act of insolvency affairs may take a favorable turn, and thus suspension of payments and of business be avoided."

The situation so described in the McDonald case is the one presented by this Record. This Court further said in the McDonald case, that there was no act of insolvency shown, since the Bank had not failed to pay any depositor or demand up to the hour of closing. The same facts appear from the undisputed evidence in the case at bar. Then comes the significant statement of this Court, as we view it, a part of which we italicize (Page 618):

"It may be that those of its Officers who knew its real condition must have dreaded an ultimate catastrophe, but there is nothing to justify the inference that the particular payments in question were made in contemplation of insolvency, or with a view to prefer the Defendant Bank. The Chemical National Bank was no more preferred by these remittances several days before suspension *than were the depositors whose checks were paid an hour before the doors were closed.*"

The general disagreement among the Circuit Courts of Appeal is illustrated by the case of *Aycock* v. *Bradbury*, 77 Fed. (2) 14. In that case the Comptroller had determined that the Bank was insolvent and had levied an assessment.

The Bank remained open, however, and on the day prior to suspension of business, allowed a depositor to select notes and warrants out of the note case of the Bank. The majority of that Court held that the Bank was in contemplation of insolvency at the time the transfer was made. McDermott, Circuit Judge, in a vigorous dissenting opinion, stated (Page 18):

> "The Comptroller, his counsel advises us, has acquiesced in the decision of the Second Circuit Court of Appeals in *Nelson* v. *Lewis*, 73 Fed. (2) 521. There a bank was insolvent, although the Comptroller and none of its officers except its Cashier, knew it. There a depositor asked for his money and was told that the Bank could not pay his check. There the depositor took securities for his balance. The Circuit Court of Appeals held the transaction was in the ordinary course of business and unassailable. The rights of a depositor in a National Bank in Oklahoma ought to be the same as the rights of a depositor in a National Bank in New York. While it seems to me that taking securities instead of cash for a deposit is not done in the ordinary course of banking business, yet that is the law in the Second Circuit; it ought to be the law as to all National Banks until the Supreme Court says to the contrary."

## II.

WHETHER A PAYMENT MADE UNDER THE CIRCUMSTANCES ENUMERATED CAN BE SET ASIDE AS FRAUDULENT, REGARDLESS OF REVISED STATUTES, SECTION 5242, ON THE THEORY THAT THE PRESIDENT OF THE CORPORATION DEPOSITOR, TOOK ADVANTAGE OF HIS INSIDE OR CONFIDENTIAL INFORMATION, GAINED IN HIS CAPACITY AS DIRECTOR OF THE BANK, AND ASSISTED HIS CORPORATION TO A PREFERENCE BY MEANS THEREOF?

It will be noted in the case at bar that the Circuit Court of Appeals of the Seventh Circuit does not expressly pass upon this question, but intimates in its opinion that regard-

less of Section 5242 there might be a recovery. (See Opinion, Record 236). In the case at bar, Ekstrom, the President of the Joint Company, who was also a Director of the Manufacturers National Bank, received no preference himself. No money was paid to him by the Bank. He had no interest in the money which was paid to the Joint Company. Ekstrom had a substantial deposit in the Bank in his own name but he did not seek to take advantage of the information which he received, as a Director of the Bank, to withdraw any of his own money. He profited in no way by the payment. He may have assisted his employer, the Joint Company, to withdraw its deposit, but in the absence of a Statute, we claim this Court has held, there could be no recovery of a payment made to his employer under the circumstances shown by this Record. Substantially the same state of facts existed in the case of *The Sanford Fork & Tool Company* v. *Howe, Brown & Company,* 157 U. S. 312; 39 L. Ed. 713. In that case this Court said (Page 317):

> "The case involves no breach of trust on the part of the agent towards the principal, but more closely resembles the case of an individual debtor giving preferences to certain of his friends, and the general rule is that, in the absence of Statute, a debtor has such *jus disponendi* in respect to his property that, although insolvent and contemplating a cessation of business and the surrender of his property to his creditors, he may lawfully prefer certain of them, even though thereby others receive no payment."

So far as we are able to determine, *The Sanford Fork & Tool Company* case is the only case decided by this Court which is exactly in point.

The question has been frequently before the Courts of Illinois, where this action arose, and in the following cases the Courts of Illinois have held that, in the absence of a Statute, there is no rule at Common Law which prevents a debtor, whether an individual or a Corporation, from law-

fully preferring any creditor it may choose. *Young* v. *Clapp,* 147 Ill. 176; *Plume Co.* v. *Caldwell,* 136 Ill. 163; *Cooper* v. *McClun,* 16 Ill. 435; *Gibson* v. *Rees,* 50 Ill. 383; *Blow* v. *Gage,* 44 Ill. 208; *Howell* v. *Edgar,* 4 (Scam.) Ill. 417; *Hudson* v. *Maze,* 4 (Scam.) Ill. 578.

And it has further been held by all of the authorities we have been able to find, that the fact of relationship of the person to whom preference is given to one or more of the Directors or Officers of the Corporation, does not invalidate the transaction, if it is otherwise fair and free from fraud. *Rockford Grocery Co.* v. *Grocery Co.,* 175 Ill. 89; *Illinois Steel Company* v. *O'Donnell,* 156 Ill. 624; *Ragland* v. *McFall,* 137 Ill. 81; *Blair* v. *Illinois Steel Co.,* 159 Ill. 353; *State National Bank* v. *Union Bank,* 168 Ill. 526; *Warren* v. *National Bank,* 149 Ill. 9; *Gottlieb* v. *Miller,* 154 Ill. 44.

Of course, it has been recognized by many Courts which adopt the principle that Directors of insolvent Corporations are Trustees of the assets for the benefit of its creditors to the extent that creditors must be paid before the assets can be distributed to stockholders or officers, that a payment made by an insolvent Corporation to its stockholders or officers is void, because it is abhorrent to equity to permit Directors, or stockholders, or officers, to use the trust funds in their hands *to prefer themselves,* if they happen to be creditors, over other creditors not so situated. But that doctrine has no application to the case at bar because, in the case at bar, Ekstrom received none of the payment that was made by the Bank to the Joint Company; he had no interest in it; he did not profit by it, and unless there is some Statute which makes the payment to a creditor void, there is no principle of Common Law or Equity which renders the payment void. The Joint Company was not an Officer of the Bank, nor was it a Director of the

Bank, nor had it any interest in the Bank, except that, by reason of its deposits, it was a creditor thereof.

The Court of Appeals of the State of New York in a case almost exactly similar to the case at bar, and construing a Statute of that State that is substantially the same as Section 91 of the National Banking Act, in the case of *O'Brien, Receiver,* v. *East River Bridge Company,* 161 New York 539; 48 L. R. A. 122, held that the payment by the Bank in question was not a void payment and denied the relief which was granted by the District Court in the case at bar and affirmed by the Circuit Court of Appeals. So far as our industry has rewarded us, this New York case is the only case where the exact question presented by this Record is determined, aside from the determination by the Circuit Court of Appeals in this case.

## III.

WHETHER, IN THE APPLICATION OR CONSTRUCTION OF REVISED STATUTE 5242, THE INTENTION OF THE PAYEE OF THE FUND WITHDRAWN FROM A NATIONAL BANK, TO OBTAIN A PREFERENCE FOR HIMSELF, IS WHAT IS INHIBITED BY THE SECTION, OR DOES THE SECTION, IN SO FAR AS IT RELATES TO INTENTION, APPLY ONLY TO THE INTENTION OF THE BANK OR ITS PAYING OFFICERS?

If we correctly understand the basis for the decision of the Circuit Court of Appeals of the Seventh Circuit in the case at bar, it is, in effect, that because Ekstrom, President of the Joint Company, with knowledge acquired by him as Director of the Manufacturers Bank, signed the check of the Joint Company at a time when he, as a Director of the Bank, had information that the Bank was in a precarious condition and might shortly close, that this amounted to an intent upon the part of Ekstrom to assist the Joint Company to a preference, and that such knowl-

edge of Ekstrom was imputable to the Joint Company, and therefore that the Joint Company intended to prefer itself over other creditors of the Bank, or intended to prevent the application of the Bank's assets in a manner prescribed by the National Banking Act, and that this intent is sufficient to avoid the payment made by the Bank, in the ordinary course of business of the Bank, and at a time when the Bank was paying all other creditors who presented their demands to it.

In so far as this principle of law is concerned, the decision of the Circuit Court of Appeals of the Seventh Circuit in the case at bar is directly contradictory to the decision of the Circuit Court of Appeals of the Fourth Circuit as announced in the case of *Lucas* v. *Federal Reserve Bank*, 59 Fed. (2) 617.

In the *Lucas* case, it appears that the Federal Reserve Bank, after it had made a loan on collateral security to the National Bank of New Bern, and after it, the Reserve Bank, had determined that the National Bank was insolvent, and its assets frozen and uncollectible, had demanded that the National Bank deposit with it, as additional security for its prior loan, $208,000.00 of additional collateral, which additional collateral the National Bank delivered to the Reserve Bank, and it was claimed in that suit that this was a transfer of collateral made by the National Bank to Reserve Bank in contemplation of insolvency and with a view of granting a preference, and that the transfer was void by reason of R. S., Section 5242. The allegations of the Bill in that respect were:

> "That the Reserve Bank, by reason of its access to examinations made of member Banks, had a more intimate knowledge of the condition of the assets of the National Banks than their own Officers."

In other words, it was contended, by the Bill of Complaint, that the transfer in question was prohibited by Section

5242 solely upon the ground that the intention of the transferee brought the payment within the condemnation of the Statute in question, notwithstanding there was no such intention on the part of the Officers of the Bank who participated in the transfer. The Circuit Court of Appeals of the Fourth Circuit in the *Lucas* case stated (Page 621):

> "The purpose of the Statute was to guard against the wrongful or preferential disposition of the assets of a Bank *by its Officers* in contemplation of insolvency; and the knowledge and intent which it requires for avoiding a transfer, relate to knowledge and intent on the part of the Officers of the Bank, who alone have the power to make the transfer." (Citing cases) "As said by Judge Wallace in the case of *Armstrong* v. *Chemical National Bank, Supra,* 'a Bank is not in contemplation of insolvency until the fact becomes reasonably apparent to its Officers that it will presently be unable to meet its obligations and will be obliged to suspend its ordinary operations'. On the other hand, if the Officers of the Bank make the transfer in contemplation of insolvency with a view of granting a preference, the transferee's knowledge or want of knowledge is immaterial." (Citing cases) "If the Officers have no such knowledge, or intent, it manifestly cannot be condemned as preferential, whatever may have been the knowledge or intent of the transferee."

It will thus be seen from the language above quoted that there is a sharp conflict between the Circuit Court of Appeals of the Fourth Circuit in the *Lucas* case and the Circuit Court of Appeals of the Seventh Circuit in the case at bar on this particular question.

IV.

WHETHER A COUNTERCLAIM OF SUCH CORPORATE DEPOSITOR, SEEKING A RECOVERY AGAINST THE RECEIVER FOR DEPOSITS MADE WHEN THE BANK WAS HOPELESSLY INSOLVENT, ON THE THEORY THAT THERE WAS SUCH FRAUD ON THE PART OF THE BANK IN RECEIVING THE DEPOSITS THAT THE TITLE THERETO DID NOT PASS TO THE BANK, CAN BE DENIED ON THE THEORY THAT KNOWLEDGE OF THE DEPOSITOR'S PRESIDENT OF FACTS WHICH INDICATED THE BANK WAS IN A PRECARIOUS CONDITION, GAINED BY HIM AS A DIRECTOR OF THE BANK, IS CHARGEABLE TO THE DEPOSITOR BECAUSE OF THE KNOWLEDGE POSSESSED BY ITS PRESIDENT?

It is not our contention that this branch of the case is of sufficient public importance to warrant the granting of a petition for Certiorari, but it is one of the points which we shall urge to the Court in the event that Certiorari is granted.

V.

WHETHER A MONEY DECREE AGAINST THE PRESIDENT OF THE DEPOSITOR MAY BE LAWFULLY ENTERED, WHERE THE PROOF IS CONCLUSIVE THAT THE PAYMENT BY THE BANK WAS NOT MADE BY HIM; THAT HE RECEIVED NO BENEFIT FROM IT, AND THAT THE PAYMENT WHICH IS VOIDED BY SECTION 5242 WAS ADMITTEDLY MADE TO THE DEPOSITOR AND NOT TO ITS PRESIDENT?

It is not our contention that this question is of that degree of public importance which would authorize this Court to grant Certiorari, but it is one of the points which we seek to have reviewed in the event that Certiorari is granted on other grounds.

## Conclusion.

1. It is the contention of Petitioners that neither under the pleadings, the proof, nor the findings of fact of the Court below was the decree justified.

2. That the undisputed proof in the Record conclusively shows the following facts, some of which are found by the Court below, and as to the others there are no contrary findings:

(a) That the payment of the check in question was made by the Manufacturers Bank at a time when it was open for business, accepting all deposits which were tendered to it, and when it was able to and did meet every demand upon it; and it closed at the customary bank closing time of that day, with nearly $500,000.00 in cash available for its creditors, either in its vaults or on deposit in the Federal Reserve Bank and other Banks.

(b) That it closed on Saturday with the expectation of opening for business on the succeeding banking day, Monday.

(c) That it was facing no certain crisis when it closed on Saturday, the day the check in question was paid.

(d) That up to the time it closed it had committed no act of insolvency.

(e) That none of its Officers anticipated or expected it would commit an act of insolvency in the immediate future, at the time the check in question was paid.

(f) That the matters discussed at the Director's meeting of the Bank at the noon meeting of June 12, in no way indicated that the Bank was facing any serious crisis, and none of its Officers thought it was facing any particular embarrassment. All of its Officers who testified expressed their opinions at that meeting that the Bank had enough cash to meet any threatened run.

(g) As a matter of precaution and because of an appeal by the National Bank Examiner to the patriotism and unselfishness of the Directors at the noon

meeting of June 12, the Directors authorized the Examiner to negotiate with some other Bank in Rockford for a consolidation of the Manufacturers Bank, upon the assurance of the Examiner that said consolidation could likely be effected through his influence.

(h) That at the noon meeting of June 12 there was no talk of closing the Bank in the immediate future.

(i) That nothing occurred at the meeting on June 12 that caused Ekstrom concern as to the future ability of the Bank to meet the demands of its depositors.

(j) That there is not a scintilla of proof in the Record, nor is there in the Record any justification for the inference, that the payment of the check in question was made with intent, on the part of the Officers of the Bank, to prefer the Joint Company over any other creditor or to prevent the application of the Bank's assets in the manner prescribed by law.

(k) There is no proof that the Bank was closed because of anything that was anticipated at the meeting of June 12.

(l) The developments after Bank closed for the day on Saturday, and the failure of the Bank Examiner to effect mergers of the Security Bank and the Swedish American Bank, and the failure to effect the consolidation of the Manufacturers Bank and the Third National, and the appraisal made by the latter Bank of assets of the Manufacturers, none of which facts were known or contemplated at the time the check in question was paid, induced the Examiner in Charge to demand the closing of the Bank; and the Directors of the Bank reluctantly and under threat and coercion of the Examiner passed a resolution which turned the Bank over to the Comptroller. This was a sudden turn of affairs not anticipated by any Officer of the Bank prior to Sunday, June 14, at 8 P. M., which was 36 hours after the check in question had been paid.

3. That the Court erred in admitting and considering Plaintiff's Exhibits 22, 23, 24 and 25.

4. Section 5242, Revised Statutes, is not susceptible to the construction that the intent or purpose of the one who received the payment declared void by the Act is of controlling significance.

5. That the affirmative defense made by Defendant, Joint Company, and the counterclaim interposed by it, were amply substantiated by the evidence and a decree should have been entered thereon.

6. The Court below erred in rendering a money decree against Ekstrom.

For all of the reasons stated in the Petition for Certiorari filed in this behalf, we respectfully petition this Honorable Court to grant a Writ of Certiorari in this cause.

Respectfully,

S. R. KENWORTHY,
Moline, Illinois,
*Solicitor for Mechanics Universal Joint Company.*
SHELBY L. LARGE,
Rockford, Illinois,
*Solicitor for Grace Ekstrom, Administratrix of Eric S. Ekstrom, Deceased.*